1	IN THE SUPREME COURT OF THE UNITED STATES						
2	x						
3	LISA MADIGAN, ET AL., :						
4	Petitioners : No. 12-872						
5	v. :						
6	HARVEY N. LEVIN :						
7	x						
8	Washington, D.C.						
9	Monday, October 7, 2013						
10							
11	The above-entitled matter came on for ora						
12	argument before the Supreme Court of the United States						
13	at 10:03 a.m.						
14	APPEARANCES:						
15	MICHAEL A. SCODRO, ESQ., Solicitor General, Chicago,						
16	Illinois; on behalf of Petitioners.						
17	EDWARD R. THEOBALD, III, ESQ., Chicago, Illinois; on						
18	behalf of Respondent.						
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1	PROCEEDINGS
2	(10:03 a.m.)
3	CHIEF JUSTICE ROBERTS: Our first case this
4	term is Case 12-872, Madigan v. Levin.
5	Mr. Scodro?
6	ORAL ARGUMENT OF MICHAEL A. SCODRO
7	ON BEHALF OF THE PETITIONERS
8	MR. SCODRO: Mr. Chief Justice, and may it
9	please the Court:
10	Congress has crafted a comprehensive body of
11	administrative and judicial procedures and remedies that
12	are tailored specifically to combatting discrimination
13	against older workers. In extending these procedures
14	and remedies to government employees, Congress did not
15	intend to permit State and municipal workers alone to
16	frustrate this regime or bypass it entirely using the
17	more general remedies of Section 1983.
18	JUSTICE GINSBURG: Mr. Scodro, there's a
19	preliminary question before we get to the question you
20	presented, and that is: What authority did the Seventh
21	Circuit have to deal with the question under the Age
22	Discrimination Act? I mean, it was it went to the
23	Seventh Circuit on interlocutory review.
24	MR. SCODRO: That's correct.
25	JUSTICE GINSBURG: A qualified immunity

- 1 question. Everybody agrees that there is no qualified
- 2 immunity. That there -- that there is indeed a claim
- 3 that the Equal Protection Clause includes age. So
- 4 Second -- Seventh Circuit had no authority to deal with
- 5 any question other than that, did it?
- 6 MR. SCODRO: It did, Your Honor.
- 7 The Seventh Circuit properly followed this
- 8 Court's holding in Wilkie. In Footnote -- in Footnote 4
- 9 of that opinion, the Court concluded correctly that
- 10 whether or not there was a Bivens action for a
- 11 recognized, in that case, due process violation, was
- 12 itself part and parcel of the first prong of the
- 13 qualified immunity inquiry and, therefore, properly
- 14 considered on interlocutory --
- 15 JUSTICE GINSBURG: But in Wilkie, the whole
- 16 case was dismissed by the district court, wasn't it? So
- 17 whatever was said in that footnote was dicta.
- 18 MR. SCODRO: Your Honor, there's an argument
- 19 in one of the amicus briefs that the -- there was an
- 20 alternative route under 1254 in Wilkie and -- and,
- 21 therefore, the argument is raised that it was dicta.
- 22 But it wasn't dicta in context, Your Honor. The court
- 23 didn't consider that alternative route. The court
- 24 squarely held that it had jurisdiction, and it goes on
- 25 to say in the footnote that the appellate court properly

- 1 exercised jurisdiction because the question of whether
- 2 there is or is not a Bivens action for this
- 3 constitutional right is properly considered part of the
- 4 OI.
- 5 JUSTICE ALITO: Now, we have an amicus brief
- 6 from law professors who argue that the Seventh Circuit
- 7 should not have considered the question of whether there
- 8 was a cause of action under Section 1983. But they also
- 9 go on to argue that we, nevertheless, have jurisdiction
- 10 to consider that question, and that it is a -- a matter
- 11 of discretion for us to decide whether to do that. Is
- 12 that -- do you agree with that position?
- MR. SCODRO: We do agree with that position.
- 14 They cite Clinton versus Jones and they cite the
- 15 Fitzgerald decision for that position, Your Honor. And
- 16 we would agree that while those may be modest extensions
- 17 of the holdings in those cases, we would agree that this
- 18 Court can exercise 2254 jurisdiction over the question.
- 19 JUSTICE KENNEDY: If we adopt that
- 20 formulation and that solution, is it as if we are
- 21 granting certiorari before judgment on an issue in our
- 22 own discretion? Is that the way it works?
- 23 MR. SCODRO: Well, I think that -- no, I
- 24 think the Court would still fairly consider the -- the
- 25 Seventh Circuit's judgment on the issue, Your Honor.

- 1 And, again, I would -- I would return to --
- JUSTICE KENNEDY: But how -- what's the
- 3 mechanism for us -- what's the rationale that we can
- 4 exercise jurisdiction where a court of appeals could
- 5 not? Because we have --
- 6 MR. SCODRO: Well --
- JUSTICE KENNEDY: -- authority to grant
- 8 certiorari before judgment or for some other reason?
- 9 MR. SCODRO: The theory advanced in the
- 10 amicus brief, with which we confer, that 1254 grants the
- 11 Court jurisdiction over the case and that would include
- 12 issues like this that were part and parcel of the case
- 13 before the appellate court.
- Now, I should note that that amicus brief
- 15 begins with the false premise that there was an exercise
- 16 of pendent appellate jurisdiction in this case. And as
- 17 we explained briefly in our reply brief, the one
- 18 reference, the sole reference to pendent appellate
- 19 jurisdiction on Page 7-A of the Petitioner's appendix is
- 20 merely a reference or a brief description of the failed
- 21 argument advanced by the Respondent that pendent
- 22 jurisdiction would not be a proper proceeding here. And
- 23 the Court did not advance. They squarely cited Wilkie
- 24 and advanced along the --
- JUSTICE KAGAN: Could I go back, Mr. Scodro,

- 1 to the -- to the rationale of -- of the -- that you're
- 2 relying on. I mean, you keep on saying "part and
- 3 parcel." But how is it part and parcel? That seems to
- 4 ally the distinction between a right and a remedy.
- 5 There's one question whether there has been a violation
- 6 of law.
- 7 MR. SCODRO: Sure.
- 8 JUSTICE KAGAN: There's another question
- 9 whether a cause of action exists to remedy that
- 10 violation. Why aren't those two separate inquiries?
- MR. SCODRO: Well, Your Honor, the Court in
- 12 Wilkie moved from one to the other in the footnote. And
- 13 I think that --
- 14 JUSTICE KAGAN: Well, I guess I'm asking you
- 15 to explain it to me --
- MS. SCODRO: Sure --
- 17 JUSTICE KAGAN: -- because that footnote is
- 18 about a sentence long. So what's the theory as to why
- 19 these are part and parcel of each other?
- 20 MR. SCODRO: Because a -- the Qualified
- 21 Immunity Doctrine itself arises out of Section 1983 in
- 22 Bivens, it would seem sensible as a matter of first
- 23 principles to consider whether or not there is such a
- 24 cause of action at all at the outset with the right to
- 25 interlocutory appeal, rather than given the qualified

- 1 immunity as defense from litigation is not just
- 2 judgment. Rather than waiting until final judgment and
- 3 on a 1291 appeal, then addressing for the first time on
- 4 appeal.
- 5 JUSTICE KAGAN: Well, that seems a different
- 6 argument, not that the two really are intertwined with
- 7 each other, but it -- that it just might make sense to
- 8 consider the one at the outset even though, in fact,
- 9 it's a separate inquiry.
- 10 MR. SCODRO: I think -- and I want to be
- 11 clear. I think there are two different rationales here.
- 12 When discussing why Wilkie was correct in what it said
- in Footnote 4, I would submit my most recent answer,
- 14 namely, that it's part and -- it is -- not part and
- 15 parcel, but it is natural and rational to consider
- 16 whether or not the cause of action exists at the outset.
- 17 With regard to --
- 18 JUSTICE SCALIA: Well, if you're correct
- 19 that the two are one and the same, how -- how is it that
- 20 we have authorized district courts to do the one or the
- 21 other? We -- we have not required district courts to
- 22 reach the merits if they're -- if they can resolve the
- 23 question on the basis of qualified immunity alone.
- 24 Well, how can that be? If the merits are necessarily
- 25 part of the qualified immunity determination?

1 MR. SCODRO: Well, Your Honor, some of the 2 merits we know are part of it under the Court's decision in Hartman where the Court concluded that the absence of 3 the failure to properly plead an element is, indeed, 4 properly considered a part of the qualified immunity 5 6 inquiry. 7 And here, the -- what Wilkie did 8 essentially, as I read it, is essentially add to that line of cases the idea that the presence or not of the 9 Bivens action in that case, but logically speaking, the 10 Section 1983 action here would be -- would be 11 12 appropriately considered as part of the -- the first prong of the traditional two-prong qualified immunity. 13 14 JUSTICE GINSBURG: You're running up against 15 the Seventh Circuit in that respect because the Seventh 16 Circuit held that the existence of an -- whether ADEA was the exclusive remedy, that that was irrelevant to 17 18 the qualified immunity issue. 19 MR. SCODRO: Your Honor, toward the end of 20 the Court's opinion, it's true, the Court uses the 21 phrase that "it's irrelevant to the qualified immunity 22 inquiry." In that context, I would submit the Court is 23 using the phrase "qualified immunity," and I think this 24 is clear in context, to refer as -- as lower courts have

at times done to the second prong; that is, the clearly

25

- 1 established element of qualified immunity.
- 2 Earlier in the opinion, in the section
- 3 labeled "jurisdiction," the Court actually cites Wilkie
- 4 and makes clear that it's following Wilkie's command
- 5 that the presence or not of the Section 1983 action for
- 6 recognized constitutional right is considered part of
- 7 the first prong.
- 8 JUSTICE ALITO: If the existence of a cause
- 9 of action could not be considered in an interlocutory
- 10 qualified immunity appeal, what would the effect be on
- 11 the defendant's right not to be tried, which is the
- 12 whole reason for allowing an interlocutory appeal in
- 13 qualified immunity cases?
- 14 Wouldn't it be the case that if the district
- 15 court found that there was no qualified immunity, then
- 16 the case would have to be tried. And only at the end of
- 17 the case could it be determined whether there actually
- 18 was a cause of action. So you have a trial potentially
- 19 about nothing.
- MR. SCODRO: That's correct, Your Honor. In
- 21 my earlier response to Justice Sotomayor's question, I
- 22 think there -- or Justice Kagan's question -- I
- 23 apologize -- I think it was -- that's exactly right.
- 24 This is immunity from litigation, immunity from suit.
- 25 JUSTICE GINSBURG: The decision was that

- 1 there was no qualified immunity. And the question is:
- 2 Having determined there was no qualified immunity,
- 3 should they have stopped there? There wouldn't have
- 4 been a trial -- if there is no qualified immunity and
- 5 they have no exemption from trial.
- 6 MR. SCODRO: No, Your Honor. To decide that
- 7 there isn't qualified immunity, the Court needs to
- 8 consider both prongs and resolve them both adverse to
- 9 the defendant. And therefore, it was essential for the
- 10 Court here to consider the argument that there is no
- 11 Section 1983 action.
- 12 JUSTICE SOTOMAYOR: I'm not sure you see the
- 13 distinction or -- or you're facing the distinction. The
- 14 right not to be tried is one of qualified immunity.
- MR. SCODRO: Correct.
- 16 JUSTICE SOTOMAYOR: But you can have a
- 17 constitutional violation and still not have a remedy,
- 18 which is what this question involves.
- 19 So, how do we deal with the concept that
- 20 other people who have motions to dismiss that are denied
- 21 still undergo trials, still experience the expense, and
- 22 yet we've said repeatedly, an interlocutory appeal is
- 23 not warranted.
- 24 And so, what makes it warranted here where a
- 25 Court has already said that there was a -- or at least

- 1 there's enough evidence to suggest a constitutional
- violation and that a reasonable officer wouldn't have
- 3 believed his or -- a person would have believed his or
- 4 her conduct was appropriate?
- 5 MR. SCODRO: Your Honor, with regard to that
- 6 question, I would return to the notion that is a matter
- 7 of first principles, given that qualified immunity is an
- 8 outgrowth of Section 1983. The Court was very just --
- 9 was justified in Wilkie in treating the presence or not
- 10 of the cause of action. This is a -- we're not talking
- 11 about an affirmative defense, for example, in the form
- of statute of limitations as one example. We're talking
- 13 about the existence or not of the Bivens right in that
- 14 case, in the Section 1983 right here.
- 15 It seems consistent with the fact that
- 16 qualified immunity exists as a defense against Section
- 17 1983 and Bivens to contemplate the existence or not of
- 18 that cause of action right at the threshold.
- 19 JUSTICE SCALIA: Maybe -- maybe you better
- 20 say a few words about the merits?
- MR. SCODRO: Thank you, Your Honor.
- The ADEA's remedial regime has the two
- 23 elements that this Court has looked at repeatedly in
- 24 determining whether a comprehensive regime or a regime
- 25 is sufficiently comprehensive to displace more general

- 1 Section 1983.
- JUSTICE GINSBURG: There's another
- 3 preliminary question, and that is, why are we talking
- 4 about the ADEA when the district court held that the
- 5 ADEA doesn't cover Mr. Levin. And there seems to be not
- 6 much of a dispute about that. You're not arguing that
- 7 the ADEA does cover him, are you?
- 8 MR. SCODRO: Well, we are -- we are arguing
- 9 that the ADEA's rights and remedies do apply to Mr.
- 10 Levin. And the reason is that in 1991, with the
- 11 amendments as part of the Civil Rights Overhaul Act that
- 12 year, the amendments in that act extended, and it's a
- 13 section entitled "Coverage of previously exempt State
- 14 employees." It -- it extended ADEA rights and remedies
- 15 to the previously exempt policymakers at other high
- 16 levels.
- 17 JUSTICE ALITO: Has the Court ever held that
- 18 an antidiscrimination statute that does not provide any
- 19 rights for a particular class of plaintiffs nevertheless
- 20 extinguishes the right of action that those plaintiffs
- 21 would have under Section 1983?
- What if Mr. Levin were under 40 years old?
- 23 Would you say that his equal protection Section 1983
- 24 cause of action was extinguished by the ADEA?
- 25 MR. SCODRO: No, we would not, Your Honor.

Τ.	And the reason
2	JUSTICE ALITO: So what is the difference
3	between someone who's under 40 and someone who is not an
4	employee within the meaning of the ADEA?
5	MR. SCODRO: Sure. And again, we're talking
6	about the 1974 to 1991 period, just to be clear, because
7	since '91 appointees and employees alike are have the
8	full range of ADEA rights and remedies.
9	During that period, under 40s, as this Court
LO	held in Cline, that workers under the age of 40 simply
L1	were not part of the social ill that Congress aimed to
L2	redress. They were concerned with the plight of the
L3	relatively older worker. It's why the Court concluded
L 4	in Cline that reverse discrimination is not covered and
L5	also the explanation for why Congress drew a line at age
L6	40.
L7	Just as in Smith, for example, the Education
L8	of the Handicapped Act didn't extend to cover all manner
L9	of hurdles confronted by a disabled student, it it
20	focused solely on a singular issue facing, a curricular
21	issue facing these students. Undoubtedly, those
22	students not covered by it would have retained their
23	Section 1983 right. Same with under-40 here.
24	Now, as to the the narrow exception that
25	existed between '74 and '91 for high-level government

- 1 policymakers, we have the EEOC's understanding of why
- 2 exactly Congress did that. They did so because there
- 3 was concern on the part of members of Congress that it
- 4 would be inappropriate from a matter of federalism and
- 5 operationally to have Federal involvement in the hiring
- 6 decisions made by the highest members, the elected
- 7 members of State and local government. And that concern
- 8 applies equally to Section 1983 claims.
- 9 Because that concern applies equally --
- 10 we're not talking about people who weren't within the
- 11 scope of the social ill; we're talking about a
- 12 deliberate carveout for reasons that apply equally to
- 13 Section 1983 -- we would submit that the exception
- 14 likewise would have had force during that interim
- 15 period.
- 16 JUSTICE KAGAN: For some -- please.
- 17 JUSTICE ALITO: Well, why should we consider
- 18 that question? If this -- if we were back in the era
- 19 before the enactment of the GERA, yes, we would have to
- 20 consider that question. But now that the new statute
- 21 has been passed, why should we consider whether someone
- 22 who was a non-employee lacked a -- a 1983 cause of
- 23 action during the period when that -- prior to the
- 24 enactment of that statute?
- 25 MR. SCODRO: You're actually -- absolutely

- 1 correct, Your Honor. As we say in our reply brief,
- 2 there is no need for the Court to confront that question
- 3 in this case.
- 4 CHIEF JUSTICE ROBERTS: Which question?
- 5 MR. SCODRO: The question of whether or not
- 6 between 1974 and 1991 exempt employees, those who then
- 7 obtained ADEA rights in 1991, whether those employees
- 8 could be -- their Section 1983 claims could have been
- 9 displaced by -- notwithstanding the fact that they were
- 10 carved out.
- JUSTICE KAGAN: But I think the point here
- 12 is that Mr. Levin is covered not by the ADEA, but by a
- 13 separate statute, the GERA. And there's a separate
- 14 question whether the GERA would displace constitutional
- 15 relief, which apparently has -- has never been argued to
- 16 anybody in this case.
- 17 MR. SCODRO: Two points, Your Honor. First,
- 18 as we explain in reply and in our opening brief, the
- 19 GERA is properly considered merely a part of the broader
- 20 remedial regime under the ADEA. And we explain why to
- 21 look at it otherwise would create all sort of manner of
- 22 artificialities.
- 23 It's -- it's -- we know from past statutes
- 24 like the Genetics Act that was passed more recently the
- 25 way in which Congress would incorporate GERA by

- 1 reference instead of vice versa. We know that, for
- 2 example, in that same 1991 Act, 1981(a) was added and
- 3 provided punitive damages for a whole array of --
- 4 JUSTICE KAGAN: Well, there are some many
- 5 similarities, many similarities, between the ADEA and
- 6 the GERA. But there are also real differences. I mean,
- 7 they're obvious -- they obviously cover different
- 8 people; there are different procedural prerequisites for
- 9 the suit; you get a different kind of review, you only
- 10 get administrative review under the GERA.
- 11 So it's a separate inquiry as to whether
- 12 this statute that has some commonalities, some
- differences, displaces constitutional claims, and it's
- 14 an inquiry that really has never been addressed in this
- 15 case.
- 16 MR. SCODRO: And, Your Honor, to the extent,
- 17 if the Court has concerns about addressing that -- and
- 18 again, I -- I'm happy to go on as to why it would be
- 19 artificial to consider the two separately. But if the
- 20 Court were to conclude that, rather than effectively
- 21 amending the ADEA, that the GERA amendments in 1991
- 22 really created a whole new statute that needs to be
- 23 considered independent, the proper remedy would not be
- 24 to dismiss this appeal, but would be to vacate the
- 25 Seventh Circuit's judgment to permit Respondent to raise

- 1 a claim that is new to this case on the merits here;
- 2 namely, that there are different rules for appointees
- 3 than employees.
- 4 CHIEF JUSTICE ROBERTS: This is an -- the
- 5 qualified immunity question is presented on
- 6 interlocutory appeal.
- 7 MR. SCODRO: It is, Your Honor.
- 8 CHIEF JUSTICE ROBERTS: Decisions on the
- 9 merits, factual and legal, are still pending. Now, we
- 10 have a determination by the district court that Mr.
- 11 Levin is not an employee.
- MR. SCODRO: Yes.
- 13 CHIEF JUSTICE ROBERTS: The prior district
- 14 court determined that he was. The Respondent's alleged
- 15 that he was an employee in their complaint. I presume,
- 16 depending on how we rule on the qualified immunity
- 17 issue, the parties may want to revisit their positions
- 18 on that question as the case goes go forward.
- 19 And the district court in the first
- 20 instance, I suppose, would be the one to decide whether
- 21 they're allowed to revisit the issue in light of the
- 22 change in his perception of the law or not.
- 23 MR. SCODRO: That's correct, Your Honor. If
- 24 this -- if I'm understanding your question, that if --
- 25 if the -- depending on how this Court rules, it is

- 1 always true under Rule 54 that he could seek to have the
- 2 district court reconsider his status.
- It's also true that if he wished to proceed
- 4 under the GERA process for vindicating ADEA rights, he
- 5 has the option of seeking a dismissal without prejudice
- 6 of his statutory claims -- this has occurred in a
- 7 handful of district court opinions -- and then ask the
- 8 EEOC if he can proceed in the first instance before an
- 9 ALJ and to advance those claims. That is also an
- 10 option.
- 11 JUSTICE BREYER: But there are a few things
- 12 I -- I don't really know. I mean, does -- do you have
- 13 to allege a claim under GERA for this particular
- 14 individual? I don't know.
- 15 And if you do, I don't know whether GERA
- 16 simply picked up whatever saving of the equal protection
- 17 otherwise would have existed in the ADEA or didn't. And
- 18 I believe that GERA applies to employment discrimination
- 19 claims based on gender or race or other things, right?
- 20 Well, every circuit in the country has said
- 21 you don't lose your -- your constitutional claim there.
- 22 So are we supposed to read GERA, it goes this way in
- 23 some cases and that way in other cases, when GERA is
- 24 silent on the matter?
- 25 And so I looked to see what the Seventh

- 1 Circuit said. Nothing. I looked to see what you argued
- 2 below. Nothing. I looked to see whether it's obvious
- 3 that GERA does apply or doesn't apply and simply picks
- 4 it up or not. I don't know. Maybe I'm just being
- 5 thick. But nonetheless, where I don't know so much and
- 6 the whole case turns on it, why are we hearing an issue
- 7 that might not even be in the case?
- 8 MR. SCODRO: Your Honor, the Seventh Circuit
- 9 was -- pronounced a rule that was indifferent as between
- 10 appointees and employees. The reason for that was the
- 11 Seventh Circuit was asked to announce a rule that is
- 12 indifferent as to employees and appointees. There
- 13 was -- the Respondent sought and obtained a rule that
- 14 the ADEA does not displace, period.
- JUSTICE BREYER: That's about people not
- 16 like the client who's at issue here. That is about
- 17 people whom the ADEA did cover. Isn't that an advisory
- 18 opinion in respect to this case? I don't know. That
- 19 has a certain ring to it. But -- but what are we doing,
- 20 deciding whether the ADEA applies and in what way to a
- 21 person to whom it doesn't apply, assuming that GERA is
- 22 in fact a separate statute that you have to sue under,
- 23 the answer to which I do not know and which has never
- 24 been argued.
- 25 MR. SCODRO: Your Honor, there's very little

- 1 lower court authority on the effect of GERA. I will say
- 2 that what courts have done for I -- there is a case, for
- 3 example, in which the allegation was Title VII as
- 4 amended in 1991. And the Court construed that naturally
- 5 to include the GERA rights.
- 6 JUSTICE BREYER: And so if there's so little
- 7 about it, sometime on occasion we dismiss a case as
- 8 improvidently granted, which is not a particularly
- 9 desirable thing to do. But how could we avoid doing
- 10 that here?
- 11 MR. SCODRO: Your Honor, to reiterate a
- 12 point made just a few moments ago, I think that the
- 13 proper resolution, if -- GERA and the ADEA, again, are
- 14 really one remedial regime. And -- and I've -- I've
- 15 pointed out 1981(a) as an example of a -- of a similar
- 16 regime where punitive damages were added to a numbers of
- 17 statutes. And yet if we considered any one of those
- 18 statute today, we would agree that it includes punitive
- 19 damages, even though it was added in a freestanding
- 20 statute as part of the 1991 Act.
- 21 But, again, I would say as a procedural
- 22 matter, should the Court harbor concerns about this
- 23 issue and wish to permit the claim that appointees and
- 24 employees are entitled to different displacement rules
- 25 and the counterargument that, no, they're not because

- 1 GERA effectively amends and adds to the ADEA, the way to
- 2 handle that procedurally would be to vacate the judgment
- 3 below and to let the parties argue those points to that
- 4 court.
- 5 As it stands, the Seventh Circuit was asked
- 6 to issue a broad pronouncement that is indifferent to
- 7 whether -- the Seventh Circuit was well aware and states
- 8 that Mr. Levin was subject to an interlocutory
- 9 determination that he was an appointee. And the court
- 10 went on, and the only relevance that had in the court's
- 11 analysis based on the way it was framed below is that,
- 12 well, because appointees and people under 40 and other
- 13 categories appear to be carved out -- and we have
- 14 answers to all of those in our briefs in response -- but
- 15 because all of them appear to be carved out, the ADEA
- 16 does not displace ever as to appointees or employees.
- 17 That doesn't contemplate a new argument that
- 18 as an -- as an appointee, rather, Mr. Levin has -- is
- 19 subject to a different displacement rule. It would be
- 20 for the Seventh Circuit to confront that in the first
- 21 place.
- JUSTICE SOTOMAYOR: I'm sorry. I -- the
- 23 only issue that's before us is whether someone who's
- 24 exempted from the ADEA still has a 1983 claim, correct?
- 25 That's what the Seventh Circuit said. If you're not a

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- 2 rights?
- MR. SCODRO: Your Honor, what the Seventh
- 4 Circuit held is that the ADEA does not displace Section
- 5 1983 claims for employees or appointees. It was a
- 6 sweeping ruling that was sought. And the contention now
- 7 is, well, perhaps the court should not have reached such
- 8 a sweeping ruling. Perhaps the court could have ruled
- 9 instead that as an appointee, Mr. Levin is entitled to a
- 10 different rule that is specific to appointees because
- 11 they're exempt under the ADEA.
- 12 That argument was never advanced before the
- 13 Seventh Circuit. And at this point, again, we would say
- 14 should the Court harbor concerns about addressing this
- 15 case, we would ask that they -- they vacate and let the
- 16 Seventh Circuit addressed that issue in the first
- 17 instance.
- 18 If permitted, I would like to reserve my
- 19 remaining time for rebuttal.
- 20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 21 Mr. Theobald?
- 22 ORAL ARGUMENT OF EDWARD R. THEOBALD, III,
- 23 ON BEHALF OF THE RESPONDENT
- MR. THEOBALD: Mr. Chief Justice, and may it
- 25 please the Court:

- 1 I'd like to first address the jurisdictional
- 2 issue. We made the argument before the Seventh Circuit
- 3 that the Seventh Circuit did not have jurisdiction to --
- 4 on this issue of preclusion. And we argued that under
- 5 Swint, the Court's decision in Swint, on an
- 6 interlocutory appeal of qualified immunity, the Court
- 7 would have to reach the -- in order to reach the issue
- 8 of qualified immunity, it would have to address the
- 9 preclusion issue. And our position was you don't have
- 10 to look at -- you don't even consider that on qualified
- 11 immunity. It's not part of the equation.
- 12 CHIEF JUSTICE ROBERTS: Well, we said the
- 13 exact opposite in Wilkie in Footnote 4. I mean, you can
- 14 say it's only a footnote, but it is what we said.
- 15 MR. THEOBALD: Well, we respectfully
- 16 disagree, Your Honor. And we made that argument and in
- 17 the decision that the Seventh Circuit reached they said:
- 18 We didn't have to consider this preclusion issue to
- 19 reach the qualified immunity denial, that qualified
- 20 immunity was not applicable. So we did argue that and
- 21 that was our position there.
- With respect to the issue presented here,
- 23 the only thing that is pertinent is whether or not the
- 24 ADEA can preclude an individual who's not covered by it,
- 25 regardless if that individual is under 40 years old or

- 1 if they're exempt from the statute or if they have a
- 2 claim that the ADEA doesn't address.
- 3 CHIEF JUSTICE ROBERTS: Well, your
- 4 brother --
- 5 JUSTICE GINSBURG: But did --
- 6 CHIEF JUSTICE ROBERTS: -- who just sat down
- 7 explained that the Seventh Circuit's ruling didn't
- 8 consider the issue that you're -- you're talking about
- 9 now.
- 10 MR. THEOBALD: Well, I would respectfully
- 11 disagree, Your Honor. We -- the Seventh Circuit -- we
- 12 made it clear in the Seventh Circuit that Mr. Levin had
- 13 been excluded. He was excluded in July of 2011 by a
- 14 decision of District Court Chang. He said in that --
- 15 CHIEF JUSTICE ROBERTS: Was that the -- was
- 16 that the first one or the second one?
- 17 MR. THEOBALD: The second one. Judge Korr
- 18 initially decided the issue twice and said Mr. Levin was
- 19 covered by the ADEA.
- JUSTICE ALITO: In your brief, could I just
- 21 -- you say -- I think this is pretty close to the exact
- 22 words: There's no realistic possibility of your
- obtaining a holding that Mr. Levin is an employee within
- 24 the ADEA. But do you concede that now?
- 25 MR. THEOBALD: I concede that there's no

- 1 realistic possibility.
- JUSTICE ALITO: No. Do you concede that he
- 3 is not an employee? If you just say that there's no
- 4 realistic possibility that the courts are going to take
- 5 this correct position, then the issue is still in the
- 6 case.
- 7 So is it your position that he is an
- 8 employee or he is not an employee?
- 9 MR. THEOBALD: Well, I -- I mean, they
- 10 dodged -- he's -- the court has ruled, the Seventh
- 11 Circuit in Opp v. Cook County State's Attorney, Your
- 12 Honor, made it very clear their State's attorneys would
- 13 be -- appointees would not be covered under the ADEA.
- JUSTICE ALITO: Well, if you're not willing
- 15 to say that he is not an employee, then the issue is
- 16 still in the case, and we would have -- if we were to
- 17 rule on the ADEA issue, wouldn't we have to decide
- 18 whether there is a remedy for somebody who is an
- 19 employee within the ADEA?
- MR. THEOBALD: Well --
- 21 JUSTICE ALITO: The district court might be
- 22 wrong on that. The Seventh Circuit might be wrong on
- 23 that. And you may be right. There's not much of a
- 24 realistic possibility that you're going to get a
- 25 reversal of that. But the issue is still in the case

- 1 unless you want to give it up.
- MR. THEOBALD: Well, the Court will so rule.
- 3 The Seventh Circuit ruled in the Opp v. Cook County case
- 4 and this Court denied cert in 2011 on the Opp v. Cook
- 5 County case. But to stand here --
- 6 CHIEF JUSTICE ROBERTS: So you don't want to
- 7 -- you don't want to give it up, which makes sense. I
- 8 mean, you've got a client. It depends on what we do,
- 9 right? I mean, depending on what our ruling is, it may
- 10 be advantageous to you to argue, as you alleged in your
- 11 complaint, that he's an employee.
- MR. THEOBALD: Well, as we stand here now,
- 13 he is not in this case. And I -- I don't know --
- JUSTICE BREYER: It's pretty universal he's
- 15 not an employee under ADEA, though he might be under
- 16 GERA. You have to say yes or no, because if you're
- 17 going to say -- I mean, you know, let's either do it or
- 18 not do it. If you -- if you want to leave this issue in
- 19 the case, it's possible to argue we should decide this
- 20 whole issue on the ground that although he's not really
- 21 a bird, he's a fish or whatever. But I mean, this is
- 22 supposed to be fairly realistic, I think, what we're
- 23 supposed to do.
- MR. THEOBALD: Okay. Well, going back to
- 25 Mr. Levin being not covered, we believe the Court's

- 1 decision in Davis v. Passman and the Court's decision in
- 2 Smith v. Robinson, which is the only case where the
- 3 Court has precluded a 1983 constitutional claim, that
- 4 that --
- 5 CHIEF JUSTICE ROBERTS: Well, just to get
- 6 this clear, you asked for this ruling from the Seventh
- 7 Circuit. And -- and you won based on a factual record
- 8 that was no different then than it is now. You asked
- 9 for this ruling based on these facts, you won, and now
- 10 you want to insulate that from the new review.
- I mean, I think it'd -- it'd be a feather in
- 12 your cap if you can pull it off. But it seems to me --
- 13 it seems to me that since you asked for the ruling on
- 14 the merits and got it, we ought to be able to review it
- 15 to determine whether it's right or wrong. And to the
- 16 extent there's a factual issue that would persist in the
- 17 case if it goes back on qualified immunity, you and the
- 18 parties can reposition themselves on that. I mean, it
- 19 is an issue that was apparently close enough for one
- 20 district court to say yes, the other district court, on
- 21 looking at it again, to say no. The deck will be
- 22 reshuffled depending on how we rule.
- 23 And as I see you standing there, I don't see
- 24 you willing to concede for -- for the future that he's
- 25 not an employee.

- 1 MR. THEOBALD: Well, we think the difference
- 2 was after the district court's decision in our case,
- 3 that the Seventh Circuit decided another case in 2010.
- 4 And that's why the second district court judge followed
- 5 that precedent. And that precedent, where this Court
- 6 denied cert, there's no real possibility that any court
- 7 is going to find Mr. Levin as being covered by the ADEA.
- 8 JUSTICE BREYER: There's no real possibility
- 9 that any court is going to find that your client was, in
- 10 fact, an employee without GERA. That's what you said;
- 11 is that right?
- 12 MR. THEOBALD: GERA is -- is another --
- 13 JUSTICE BREYER: It's a different statute.
- 14 But just without GERA, he's a political appointment or
- 15 whatever it is, so he's not within ADEA. That's what I
- 16 think this is about.
- 17 MR. THEOBALD: Yes, Your Honor.
- JUSTICE BREYER: That's correct.
- MR. THEOBALD: Yes.
- JUSTICE BREYER: And you agree with that.
- MR. THEOBALD: Yes.
- 22 JUSTICE BREYER: Okay. Then thank you very
- 23 much. And then my argument comes into play that we
- 24 shouldn't be deciding issues of an advisory nature that
- 25 do not involve individuals who fall within the statute

- 1 that someone once interpreted.
- 2 JUSTICE KAGAN: Do you also agree that he is
- 3 covered by GERA?
- 4 MR. THEOBALD: It is unclear, Your Honor.
- 5 We don't -- GERA is unclear whether, first of all, in
- 6 the Alaska case v. EEOC, whether it applies to States.
- 7 States have argued that they're not included in the
- 8 definition -- definition of GERA. And the State of
- 9 Illinois has not waived sovereign immunity under the
- 10 GERA statute.
- 11 JUSTICE ALITO: So what --
- 12 MR. THEOBALD: So whether or not there's a
- 13 remedy there is very unclear. And this -- as
- 14 Justice Breyer mentioned, it's been never discussed in
- 15 this case. It was never discussed in the Seventh
- 16 Circuit, never discussed in the district court. It
- 17 wasn't discussed at the EEOC. When we filed a charge,
- 18 the Attorney General didn't come in and say this should
- 19 be handled under GERA.
- JUSTICE KAGAN: Well, it was never discussed
- 21 because you never raised it; isn't that right?
- MR. THEOBALD: Our position was it was
- 23 inapplicable. We didn't -- we wouldn't raise it. It
- 24 would be -- someone else would raise it. There's about
- 25 a handful of cases nationally that are filed under GERA

- 1 every year. Some years, there's no cases filed at the
- 2 EEOC. It's seldom used.
- 3 JUSTICE ALITO: You want us to hold that the
- 4 Seventh Circuit lacked jurisdiction to consider whether
- 5 there is a cause of action under Section 1983. So that
- 6 precedent, that Seventh Circuit precedent, would be
- 7 wedged from the books. The issue would be back in the
- 8 case. If ultimately there was another appeal, maybe it
- 9 would go to a different Seventh Circuit panel. Maybe it
- 10 would come out differently.
- 11 So you want that wiped away. And you want
- 12 us to hold only -- to limit our consideration to the
- 13 ADEA and not consider GERA, so that would be back in the
- 14 case when it came -- when it went back to the district
- 15 court.
- 16 So that's correct? That's what you want?
- 17 MR. THEOBALD: Yes, Your Honor. And
- 18 that's -- our position is we didn't argue the
- 19 jurisdictional issue in our brief, but the court was
- 20 concerned about it and we did address it in the Seventh
- 21 Circuit.
- I would point out, in the Seventh Circuit's
- 23 decision, though, their decision throughout the -- for
- 24 instance, the -- the Seventh Circuit talks about
- 25 Mr. Levin not being an appointee on the policymaking

- level and exempt, so that was in the case. It wasn't
- 2 something where they just decided whether the ADEA
- 3 precludes individuals that are covered.
- 4 JUSTICE GINSBURG: And as far as the -- the
- 5 preclusion is concerned, why does it make a difference
- 6 whether it's ADEA or GERA? Wouldn't the arguable
- 7 preclusion be even stronger under -- under GERA, because
- 8 there is a special administrative remedy, you have to go
- 9 to the EEOC first, and the only form for review is the
- 10 Federal Circuit.
- 11 MR. THEOBALD: That's correct, Your Honor.
- 12 The -- there's no preclusion under GERA or
- 13 the ADEA. We've set forth that the Court should look at
- 14 preclusion with two questions: The first question under
- 15 preclusion is under Sea Clammers. Sea Clammers was a
- 16 case where they passed a new statute with the new right
- 17 and had an enforcement provision in the statute, and the
- issue was whether or not under Sea Clammers the Congress
- 19 intended to preclude 1983 to enforce that statute. And
- 20 the Court came to the conclusion, yes, that it would be
- 21 inconsistent to use 1983 with that statute.
- The second standard that the Court has used
- 23 is under Smith v. Fitzgerald, which is applicable here,
- 24 if we're looking at whether the ADEA precludes somebody
- 25 covered by the ADEA. And that is, when a statute is

1	passed	with	an ei	nforcement	provision,	did	Congress
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- 2 intend to use that enforcement provision to also enforce
- 3 preexisting independent statutory or constitutional
- 4 rights?
- 5 And, two, did Congress intend to use this
- 6 provision in the new statute to be the sole exclusive
- 7 remedy of the preexisting independent constitutional
- 8 right? GERA cannot preclude a constitutional -- GERA --
- 9 there's no evidence that when Congress passed GERA they
- 10 intended GERA to enforce the constitutional right to
- 11 equal protection of the law. It doesn't --
- 12 JUSTICE ALITO: Can I ask you a question
- 13 about the constitutional right? Do you agree that the
- 14 standard for an equal protection age-discrimination
- 15 claim is traditional, full-blown, rational-basis review?
- MR. THEOBALD: Yes, Your Honor.
- 17 JUSTICE ALITO: So that if there's any
- 18 conceivable ground on which the decisionmaker could have
- 19 decided that age was -- it was proper to make an age
- 20 classification, there is no constitutional violation?
- 21 MR. THEOBALD: We can see where the rational
- 22 basis test -- the court found we survived summary
- 23 judgment on our equal protection gender discrimination
- 24 claim and the age discrimination claim.
- JUSTICE ALITO: No, I'm just talking about

- 1 equal protection age discrimination.
- MR. THEOBALD: Yes.
- JUSTICE ALITO: And what if the Illinois
- 4 legislature passed a statute that said: Now, forget
- 5 about the ADEA. There is no ADEA. There is no state
- 6 anti-discrimination law involved here. All we are
- 7 talking about is equal protection. And they passed a
- 8 law that said: All attorneys working for the State of
- 9 Illinois must retire at the age of 60, because everybody
- 10 knows, you know, once a lawyer passes 60, there's
- 11 nothing left.
- 12 MR. THEOBALD: We're all in trouble.
- JUSTICE ALITO: Would that be -- would that
- 14 survive a rational basis review?
- 15 MR. THEOBALD: I don't believe so. This
- 16 Court has considered that issue on two occasions. In
- 17 Gregory v. Ashcroft that was before the Court. It was
- 18 a -- the plaintiffs were excluded, like Mr. Levin, and
- 19 yet this Court acknowledged the equal protection 1983
- 20 claim. They didn't -- the reasons that were used in
- 21 that case were insufficient to meet the rational basis
- 22 test.
- 23 JUSTICE KAGAN: Mr. Theobald, are there any
- 24 cases out there in the universe of cases in which a
- 25 person does not have an ADEA claim or a GERA claim, but

- 1 has pressed a successful constitutional claim based on
- 2 age discrimination?
- 3 MR. THEOBALD: Well, GERA has never been --
- 4 there's one case on GERA that we could find. It's over
- 5 a 20-year-old District Court of New York decision that
- 6 said GERA can't preclude anything. So if we put GERA
- 7 together with the ADEA, it's only been really one
- 8 district court has addressed that issue. And --
- 9 JUSTICE KAGAN: I quess the question is,
- 10 what are the circumstances in which, given the very low
- 11 standard or given -- given the very low rational basis
- 12 standard, what are the circumstances in which you would
- 13 have a viable constitutional claim but not a statutory
- 14 claim? What would that case look like?
- 15 MR. THEOBALD: If you had a claim under
- 16 1983, it would also, I believe, violate the ADEA.
- 17 If that -- if I -- if that's your question.
- JUSTICE KENNEDY: Would there be any
- 19 unfairness to the parties if this case were remanded to
- 20 the court of appeals with instructions for it in turn to
- 21 remand to the district court to see whether or not the
- 22 GERA issue has been properly presented or waived and to
- 23 consider that? Would there be --
- MR. THEOBALD: Well, it would be --
- 25 JUSTICE KENNEDY: -- any unfairness to the

- 1 parties in doing that?
- MR. THEOBALD: Be very unfair to us, Your
- 3 Honor. We were scheduled to go to trial in May before
- 4 the Court granted its cert. The case has been pending
- 5 almost six years. And to raise this issue at this --
- 6 this issue in GERA was raised this year. It wasn't
- 7 raised for six years. Never -- whenever it was part of
- 8 this case. And I don't think that --
- JUSTICE KENNEDY: That argument -- that
- 10 argument could be made in the district court.
- MR. THEOBALD: Well, for something that's as
- 12 suspect as GERA whether it even applies, it's -- the
- 13 State has not said it applies --
- 14 JUSTICE BREYER: What about doing --
- MR. THEOBALD: -- the State of Illinois.
- 16 JUSTICE BREYER: What if the -- is there
- 17 anything unfair about this? I think Justice Ginsburg
- 18 wrote an opinion in -- I recall a Third Circuit case
- 19 involving ERISA or some medical thing, and an issue came
- 20 up that was quite relevant and nobody had really thought
- 21 about it before or done much about it. And what she
- 22 wrote, to my recollection, is: Well, we would like the
- 23 advice of the lower court if they want to give it.
- 24 And so we send it back for the Third Circuit
- 25 to consider whether it's appropriate to reach the issue,

- 1 and if it is appropriate to reach the issue, do so. Or
- 2 if they think the district court should reach it, do so.
- 3 In other words, we can't figure it out at this moment
- 4 what's fair in terms of the entire litigation.
- Now, would that -- would that be a serious
- 6 problem for you or your client?
- 7 MR. THEOBALD: Well, our position is that,
- 8 yes, that none of these apply. ADEA cannot preclude
- 9 somebody that's covered. The Seventh Circuit opinion
- 10 covers that. The ADEA can't preclude somebody that's
- 11 not covered. And this Court's opinion in
- 12 Davis v. Passman and footnote 22 in Smith v. Robinson
- 13 talks about --
- JUSTICE SOTOMAYOR: I don't know if you've
- 15 satisfied my colleagues. I'm not sure that you've
- 16 answered directly. I think your adversary is right that
- 17 the Seventh Circuit held that no one is precluded from a
- 18 1983 claim, whether they're an employee or a
- 19 non-employee. That's the way the case was litigated.
- 20 That's the way they decided. The broad statement,
- 21 whether he's an employee or not an employee, he doesn't
- 22 have a 1983 -- he has a 1983 action.
- 23 You've come in and you've said he's not an
- 24 employee, so he's entitled to his 1983 claim.
- MR. THEOBALD: Yes.

- 1 JUSTICE SOTOMAYOR: All right. My
- 2 colleagues are asking you, that only takes care of half
- 3 of this problem, because the circuit said even if he was
- 4 an employee he would still have it. And so you're being
- 5 asked, are you giving up that part of the claim, that
- 6 he's not an employee?
- 7 MR. THEOBALD: Yes, he's been excluded.
- 8 I --
- 9 CHIEF JUSTICE ROBERTS: Well, then I assume
- 10 -- if you're saying the qualified immunity ruling should
- 11 not be reviewed because this person was not an employee,
- 12 but instead covered by GERA, right?
- MR. THEOBALD: We don't agree that he's
- 14 covered by GERA, but it's -- it's not clear.
- 15 CHIEF JUSTICE ROBERTS: Well, they didn't
- 16 address GERA in the preclusion ruling, right? So
- 17 presumably, they get another -- they get a chance on an
- 18 interlocutory appeal; the whole thing is -- qualified
- 19 immunity is supposed to protect them from trial. And if
- 20 you say the GERA issue wasn't -- wasn't considered, even
- 21 though the Seventh Circuit's ruling was sweeping and
- 22 didn't distinguish, well, they should have a chance to
- 23 assert qualified immunity under that ground, I would
- 24 think.
- MR. THEOBALD: Well, I don't think that

- 1 would factor in, Your Honor, with the qualified immunity
- 2 analysis. The Seventh Circuit held and the district
- 3 court held that your decision in Kimel acknowledged
- 4 equal protection 1983 claims, and that's the issue in
- 5 qualified immunity.
- They have not asked this Court to review the
- 7 qualified immunity aspect of the Seventh Circuit's
- 8 decision. Just the preclusion part.
- JUSTICE ALITO: Well, that's true, but is
- 10 that the issue? Is that really the qualified immunity
- 11 issue, whether irrational age discrimination violates
- 12 equal protection? Or is the qualified immunity issue
- 13 whether, on the facts here, an official could believe
- 14 that there was no constitutional violation, reasonably
- 15 believe there was no constitutional violation? Isn't
- 16 the latter --
- 17 MR. THEOBALD: It's the latter, yes.
- 18 JUSTICE ALITO: Isn't the latter the real
- 19 question.
- MR. THEOBALD: Yes, Your Honor.
- JUSTICE ALITO: Well, that's not what the
- 22 district court held though, is it?
- 23 MR. THEOBALD: The district court did so
- hold, yes.
- 25 JUSTICE ALITO: I thought the district court

- 1 simply held that an official should have realized that
- 2 irrational age discrimination was a violation of the
- 3 Constitution, not that an official should have realized
- 4 that it was a violation of the Constitution to do what
- 5 was alleged to have been done here.
- 6 MR. THEOBALD: I think it answered both
- 7 questions, really. I don't -- I don't see the
- 8 difference.
- JUSTICE ALITO: You don't see the difference
- 10 between the two?
- MR. THEOBALD: No, Your Honor. I -- I think
- 12 that the court's -- the district court's decision held
- 13 no qualified immunity. The Seventh Circuit cited this
- 14 Court's decision in Kimel. The other cases before this
- 15 Court, Gregory v. Ashcroft, acknowledged an age
- 16 discrimination case brought through 1983 and it was
- 17 clearly established.
- The Seventh Circuit acknowledged the 1983
- 19 age discrimination equal protection claim in 1977 in
- 20 Gault v. Garrison. This is a well-settled issue.
- 21 JUSTICE ALITO: If there's a qualified
- 22 immunity appeal on the question -- on the issue of
- 23 whether, let's say, a search was an unreasonable search,
- 24 would qualified immunity be denied on the ground that an
- 25 official should realize that an unreasonable search is

- 1 unconstitutional? Would that be -- would that be the
- 2 issue under qualified immunity?
- 3 MR. THEOBALD: Well, if the facts that the
- 4 officer was presented, if there wasn't -- it wasn't well
- 5 settled that the conduct --
- JUSTICE ALITO: Ah, on the facts that were
- 7 presented.
- 8 MR. THEOBALD: Yes, Your Honor.
- 9 So on the people that aren't covered, we
- 10 have four groups: People that are under 40 under the
- 11 ADEA; people in the -- that are exempt; individuals that
- work for a government employer that have less than 20
- 13 employees are not covered by the ADEA; and people that
- 14 have a particular type of claim, a retaliation claim, a
- 15 claim for emotional distress damages, something like
- 16 that, they're not covered.
- 17 The State concedes that the people under 40,
- 18 they're going to bring equal protection claims through
- 19 1983. There's no difference between those people and
- 20 Mr. Levin and the other two categories. You're either
- in or you're out.
- JUSTICE SCALIA: Yeah, but that's not what
- 23 the Seventh Circuit held. I mean, that -- that may well
- 24 be, but we're asked to review a holding by the Seventh
- 25 Circuit that even if you aren't covered, even if you're

- 1 not exempt, you still have a 1983 claim. That's --
- 2 that's why we took this case.
- And now you're -- you're telling us we
- 4 should not review what the Seventh Circuit held. And
- 5 that would presumably remain the circuit law, right?
- 6 MR. THEOBALD: Yes, Your Honor.
- JUSTICE KAGAN: Well, not if there's no
- 8 jurisdiction, right? If they didn't have jurisdiction,
- 9 the thing would be wiped out.
- 10 MR. THEOBALD: Yes, that -- that is true.
- 11 But I believe the Seventh Circuit in its opinion, and I
- 12 could just refer to things in the appendix at page 57A.
- 13 In the district court's opinion, the district court said
- 14 Mr. Levin is exempt. In the Seventh Circuit opinion,
- 15 the Seventh Circuit Docket No. 44 talks about end-runs.
- 16 The Seventh Circuit Docket No. 37, page 67, the
- 17 plaintiff was an employee on the policymaking level.
- 18 So it's clear that the Seventh Circuit knew
- 19 we argued that he was exempt. We argued that the --
- 20 being exempt under the district court's decision in
- 21 Fitzgerald gives an individual the right to bring an
- 22 equal protection claim. And the Court mentioned that in
- 23 Fitzgerald, the decision in 2009, being exempt from
- 24 Title IX.
- 25 CHIEF JUSTICE ROBERTS: In the Seventh

- 1 Circuit, even though they -- you had that reference to
- 2 him being exempt, the Seventh Circuit basically said it
- 3 didn't make a difference, right? Whether he was covered
- 4 as -- as an employee or not covered or covered under
- 5 GERA or anything else, under their analysis, it doesn't
- 6 make a difference.
- 7 MR. THEOBALD: I think we could read the
- 8 opinion that way, but they certainly were aware that Mr.
- 9 Levin was not covered. The -- the State has argued
- 10 since Mr. Levin has been excluded before the Seventh
- 11 Circuit and before this Court, they used the terms
- 12 "exhaustion," "not exhausting remedies," and they used
- the word "avoids the scheme," "they avoid the ADEA."
- In the opening brief before -- the merits
- 15 brief before this Court, the State used the term
- 16 "exhaustion" or "failure to exhaust" more than a dozen
- 17 times. They used the term "avoiding the ADEA" at least
- 18 six times.
- 19 This argument is the old Zombro argument,
- 20 the first case that held preclusion where somebody
- 21 didn't go through. Exhaustion has nothing to do with
- 22 this case. This Court's opinion in Patsy v. Board of
- 23 Regents said you don't have to exhaust from 1983. All
- the cases, Johnson v. Railway Express, CBOCS v.
- 25 Humphries, there's no exhaustion required. And to top

- 1 it off, Mr. Levin, he exhausted his remedies. He filed
- 2 at the EEOC. He got a right to sue under Title VII.
- 3 So --
- 4 JUSTICE GINSBURG: Let's assume that the
- 5 question that was presented is before us. And you --
- 6 you have argued Fitzgerald. The other side says
- 7 Smith v. Robinson should control. So why shouldn't the
- 8 Handicapped Act decision control? That, like the ADEA,
- 9 has allowed procedural parts that wouldn't be included
- 10 in an equal protection claim.
- MR. THEOBALD: We believe, Your Honor, that
- 12 those two cases are the second standard. The Smith --
- 13 we agree with the standard in Smith. We agree in the
- 14 standard with Fitzgerald. And the standard in Smith,
- 15 what that case was about was the Educational for All
- 16 Handicapped Act, whether that Act precluded the use of
- 17 504 of the Rehabilitation Act, the statutory claim, and
- 18 whether it precluded 1983 constitutional claims.
- 19 And the Court in Smith v. Fitzgerald said
- 20 that it did, because there was no -- the EHA, the
- 21 remedies and the procedures there was not for a de novo
- 22 review in court. So the plaintiff's claim was
- 23 precluded. We have no problem with the Smith standard.
- 24 But the Court also said in Smith that if
- 25 there are matters that are offered to the children, the

- 1 disability of the disabled children or their parents
- 2 under the EHA that that doesn't cover, those things, if
- 3 they're offered to parents and if they're offered in a
- 4 discriminatory matter or denied for discrimination,
- 5 those claims can be brought under the 1983 equal
- 6 protection claims or under Section 504 of the
- 7 Rehabilitation Act, the preexisting statutory claim.
- 8 So applying that to the ADA, there is no
- 9 evidence that in passing the ADA for covered individuals
- 10 that Congress intended to preclude the preexisting 1983
- 11 equal protection claim. So our second standard in our
- 12 brief is the Smith-Fitzgerald standard. In Fitzgerald,
- 13 the Court went further and explained if the rights and
- 14 protections of the statute that is seeking precluding
- 15 are different than the equal protection claim, then
- 16 there is no preclusion.
- 17 And here, the rights and protections between
- 18 the ADA and the equal protection through 1983 are vast,
- 19 are vast. There's different parties, different
- 20 defendants. In the ADEA the entity is the defendant.
- 21 In equal protection 1983 it's individual. In the ADEA,
- 22 all these exemptions of people that aren't covered; if
- 23 somebody pursues a 1983 equal protection claim, there is
- 24 no exemptions of individuals.
- 25 So to conclude, Your Honor, we adopt the

- 1 Smith standard. We have no problem with Smith.
- JUSTICE SCALIA: Counsel, I'm trying to --
- 3 trying to see how -- how many of these arguments that
- 4 you have made before us about why -- why we can't get to
- 5 the holding of the Seventh Circuit, how many of them you
- 6 made in your brief in opposition. I mean, we -- we
- 7 don't like to dismiss a case as improvidently granted,
- 8 and --
- 9 MR. THEOBALD: We could have done --
- 10 JUSTICE SCALIA: -- only when the -- when
- 11 the case is before us, counsel suddenly finds all sorts
- 12 of reasons why we shouldn't have taken it in the first
- 13 place. You should have told us that before we took it.
- MR. THEOBALD: We could have done a better
- 15 job -- we could have done a better job, Your Honor, and
- 16 I apologize for that. We did try to point out that Mr.
- 17 Levin was exempt. We did say that and how under
- 18 Fitzgerald the exemptions formed the basis of an equal
- 19 protection claim.
- JUSTICE SCALIA: Well, I read your brief in
- 21 opposition as -- as going exclusively to what your
- 22 unfortunate brother barely had a chance to argue; that
- 23 is, the merits of the case. That -- that's what your
- 24 brief in opposition addressed, and here we end up
- 25 spending most of our discussion on -- on other stuff.

1	I don't I don't like to encourage that.
2	MR. THEOBALD: We could have done a better
3	job.
4	Thank you.
5	CHIEF JUSTICE ROBERTS: Thank you, counsel.
6	Mr. Scodro, you have five minutes remaining.
7	REBUTTAL ARGUMENT OF MICHAEL A. SCODRO
8	ON BEHALF OF THE PETITIONERS
9	MR. SCODRO: Thank you, Mr. Chief Justice.
L O	Just a couple of quick points.
L1	Justice Kagan, in answer to your question to
L 2	my colleague, I am not aware of any cases, nor can I
L3	conceive of one, in which one would have an equal
L 4	protection claim but could not state a cause of action
L5	under the ADEA. And I think this Court's decision in
L6	Kimel makes clear that such a universe does not exist.
L7	The question in response to a question from
L8	Justice Sotomayor regarding the scope of the Seventh
L9	Circuit's decision below, proof positive that the
20	Seventh Circuit was was, in fact, announcing the
21	sweeping rule that Respondent sought is the fact that
22	the court departs openly from the the law in other
23	circuits. So it was in fact they were creating, they
24	were knowingly creating the split.
) 5	The only reference in the analysis portion

- 1 of the case to the fact that there are exemptions for
- 2 high-level officials appears on page 33A.
- 3 JUSTICE SOTOMAYOR: Can you tell me what the
- 4 authority is for Congress to extinguish a right for a
- 5 constitutional violation? Meaning --
- 6 MR. SCODRO: Sure.
- JUSTICE SOTOMAYOR: -- assume that
- 8 someone -- it was the question that Justice Alito asked
- 9 you -- someone under of the age of 40, someone who's not
- 10 covered by any statute, someone who's part of an
- 11 employer under 20. What would suggest to you in this
- 12 statute that Congress intended to extinguish those
- 13 people's rights?
- 14 MR. SCODRO: Sure, Your Honor. There are
- 15 really two parts to my answer. The first is they --
- 16 they didn't. It has been overstated what has not --
- 17 what has been exempted. Our position is that nobody
- 18 whose Section 1983 claims are -- would be displaced
- 19 would not, in exchange, receive the full rights and
- 20 benefits under the ADEA.
- 21 There is a reference to --
- JUSTICE SOTOMAYOR: I'm sorry. Restate that
- 23 again so I understand what you are saying.
- MR. SCODRO: Of course. Nobody who -- the
- 25 universe of -- of employees, or workers, to use the

- 1 neutral term here. The universe of workers who would
- 2 not have a Section 1983 claim under the State's theory,
- 3 that every member of that universe would have a right to
- 4 bring a claim under the Equal Protection Clause. The
- 5 under 40s, we agree -- as we say in our brief, we agree
- 6 that under 40 that was not the social ill that Congress
- 7 was addressing in the Age Discrimination Act, consistent
- 8 with this Court's holding in Cline; and, therefore,
- 9 those individuals retain their right, the small
- 10 workplace, the under 20.
- 11 The EEOC --
- 12 JUSTICE SOTOMAYOR: Absent the GERA --
- MR. SCODRO: Yes.
- 14 JUSTICE SOTOMAYOR: -- would people who are
- 15 executive officers, etcetera, absent the GERA --
- MR. SCODRO: Yes.
- 17 JUSTICE SOTOMAYOR: -- would they have
- 18 retained their constitutional right?
- 19 MR. SCODRO: They would. We do not -- we --
- 20 we understand the displacement doctrine and -- and
- 21 certainly, as applied here, it would displace the 1983
- 22 remedies. We assume that courts retain their inherent
- 23 authority to use equitable power to stop the ongoing
- 24 violation of the Constitution.
- 25 JUSTICE KAGAN: Mr. Scodro, you are in a

- 1 situation where the question is not whether the remedial
- 2 scheme displaces a 1983 suit brought for a violation of
- 3 the same statute that contains the remedial scheme.
- 4 Instead, you have to argue that this remedial scheme
- 5 displaces a preexisting statutory or constitutional
- 6 right. And when we've had that situation in the past,
- 7 we've looked to more than just the remedial scheme
- 8 itself.
- 9 You know, Smith looks to the language of the
- 10 statute, which refers to constitutional claims. It
- 11 looks for legislative history. It looks to the
- 12 coincidence between the statute -- the new statutory
- 13 claim and the old constitutional claim. And it seems to
- 14 me that you don't have any of those things. All you
- 15 have is a complicated remedial scheme, which would be
- 16 enough to say, look, you can't bring 1983 suits to
- 17 vindicate this statute. But seems as though it's not
- 18 enough under our case law to repeal preexisting rights
- 19 and remedies.
- 20 MR. SCODRO: Your Honor, Smith -- as we
- 21 understand Smith, and certainly as it's been read by
- 22 Rancho Palos Verdes in Fitzgerald even, it stands for
- 23 the proposition that the lodestar inquiry and I think
- 24 word primary emphasis of that phrase may be used in
- 25 Fitzgerald to describe the comprehensiveness of the

- 1 regime as the first and most important inquiry. After
- 2 that, Smith makes clear that we are allowed to consider
- 3 if there is a comprehensive regime, whether there is
- 4 contrary evidence in the face of the legislative
- 5 history, as there is, for example, for Title VII, not so
- 6 for the ADEA.
- 7 JUSTICE GINSBURG: But are we -- if the ADEA
- 8 is expanding the Civil Rights protection against age
- 9 discrimination much more generous to the employee, isn't
- 10 it strange to think that Congress at the same time
- 11 wanted employees to have these expanded rights and to do
- 12 away with the preexisting remedies?
- MR. SCODRO: No, Your Honor, not at all.
- 14 When Congress provided the expanded right, they
- 15 recognized that there were characteristics particular to
- 16 age discrimination that warranted very low damages
- 17 awards and a procedural predicate that would emphasize
- 18 swift and informal dispute resolution.
- 19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. SCODRO: Thank you.
- 21 CHIEF JUSTICE ROBERTS: The case is
- 22 submitted.
- 23 (Whereupon, at 11:04 a.m., the case in the
- 24 above-entitled matter was submitted.)

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